IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

:: J U D G M E N T ::

D.B. CRIMINAL APPEAL NO.214/2006
(Umesh & Anr. Vs. State of Rajasthan)

D.B. CRIMINAL APPEAL UNDER SECTION 374(2) Cr.P.C. AGAINST THE JUDGMENT DATED 15.02.2006 PASSED BY THE LEARNED ADDITIONAL SESSIONS JUDGE (FAST TRACK), RAJSAMAND IN SESSIONS CASE NO.18/2005.

DATE OF JUDGMENT : 11th DECEMBER, 2007

P R E S E N T

HON'BLE MR. JUSTICE BHAGWATI PRASAD
HON'BLE MR. JUSTICE DEO NARAYAN THANVI

Mr. D.K.Gaur for the appellants.
Mr. J.P.S. Choudhary, Public Prosecutor.
Mr. Sandeep Mehta,
Mr. Vinod Sharma for the complainant.

BY THE COURT : (PER THANVI,J.)

1. This appeal is directed against the judgment dated 15.02.2006 passed by the learned Additional Sessions Judge (Fast Track), Rajsamand in Sessions Case No.18/2005, whereby, he convicted both the accused appellants as under:

1. Section 364 IPC : Imprisonment for life and to pay a fine of Rs.500/-, in default of payment of fine to further undergo one month's imprisonment.

2. Section 302 read with Section 34 IPC : Imprisonment for life and to pay a fine of Rs.500/-, in default of payment of fine to further undergo one month's imprisonment.

3. Section 201 IPC : Rigorous imprisonment for 7 years and to pay a fine of Rs.200/-, in default of payment of fine to further undergo 15 days' imprisonment.

4. Section 404 IPC : Rigorous imprisonment for 3 years and to pay a fine of Rs.200/-, in default of payment of fine to further undergo 15 days' imprisonment.

All the sentences were ordered to run concurrently.

2. Facts leading to this appeal are that on 29.6.2004 Smt. Manju moved an application before the Superintendent of Police, Udaipur that on 25.6.2004, her husband dealing in mines business left in the morning for looking after cutting of mines at Rajnagar Gangsa and told that he will stay there for two days. When he did not return, she telephoned and came to know that he left Rajnagar on 25.6.2004 itself along with accused Rajesh Panchal, who is the partner of his mines. When she enquired

from accused appellant Raju on telephone, he replied that Lalit left in the night of 25th at 9 pm. When she told to make complaint to the police, it was told to her by accused appellant Raju to wait for two – three days more. On preceding night i.e. 28.06.2004, she also received a telephonic call in the name of one Hanif from Machhala Magri Kachhi Basti, who threatened to make payment of Rs.3,60,000/-, which was taken by Lalit within a week, else there will be dire consequences. Ten minutes after this call, accused appellant Raju also telephoned from Keshariyaji about whereabouts of Lalit. In this complaint, she apprehended the role of accused appellant Raju Panchal and former partner Giriraj Soni, who has also filed suit against her husband. This compliant was forwarded to the Circle Officer (West), Udaipur for necessary action. On 1.7.2004, a report was submitted by him, in which, it was found that accused appellants Raju @ Rajkumar and Umesh have committed murder of deceased Lalit Jain by kidnapping him in the car from Rajnagar to Ambaji and threw his dead body at Khedbrahma (Gujarat).

3. Upon this report, police registered a case for offence under Sections 364, 302, 201 read with Section 34 IPC and commenced investigation. During investigation, both the accused appellants were arrested and on their information, site was inspected, recoveries of golden ring, watch, one iron ring, one

iron panna, mobile instrument, car key and its documents about registration, driving and insurance were made. Post mortem of the dead body was conducted and DNA & FSL examination were also conducted. After investigation, both the accused appellants were challaned in the court of learned Magistrate, who committed the case to the court of Sessions.

4. After hearing the arguments on charge, both the accused appellants were charged for offence under Sections 364, 302 in alternative under Section 302 read with Section 34 IPC, 201 and 404 IPC, to which they pleaded not guilty. Prosecution produced 41 witnesses and 149 documents were got exhibited. Statements of accused appellants were recorded under Section 313 Cr.P.C. They produced two witnesses in defence. After hearing the arguments, the learned trial Judge convicted the accused appellants as indicated above.

5. We have heard learned counsel for the accused appellants and the learned Public Prosecutor.

6. It has been contended by learned counsel for the accused appellants that the prosecution has failed to establish the cause of death as the body recovered was decomposed and was not identified. The entire case of the prosecution is based on

unreliable extra judicial confession and circumstantial evidence including that of last seen. The evidence of extra judicial confession is of Amit Tanwar PW-12, who was called by the police being known to the wife of deceased. Likewise, Mohd. Sajid PW-13 is the witness of last seen, who saw the accused appellants taking deceased in the car, but both these witnesses are history sheeters. The motive is said to have been the demand of money by the accused persons who advanced them to deceased and prosecution has not investigated into this line. Had there been such transaction, then why the accused killed deceased. Rest of the witnesses except deceased's wife and relatives are hostile. Lastly it has been argued that merely on the basis of information furnished under Section 27 of the Indian Evidence Act and recovery of the articles as stated above found on the body of deceased, cannot be said to be the sole basis for conviction, unless full chain of circumstantial evidence is established.

7. Per contra, learned Public Prosecutor has supported the judgment of the learned trial court and argued that despite there being no direct evidence, the evidence of recovery is sufficient to connect the accused appellants with the commission of crime, which has been made in pursuant to the information furnished by the accused appellants under Section 27 of the

Indian Evidence Act.

8. The motive is about demand of Rs.3,60,000/- which were advanced to the deceased as has been said in the FIR and told to the informant Smt. Manju PW-21, who is wife of deceased Lalit Jain on telephone one day prior to the filing of the report i.e. on 28.6.2004 by one person named Hanif. But this Hanif has not been detected by the police and the telephone from where this call was made was of STD booth belonging to Saroj Bala PW-11. Saroj Bala PW-11 has been examined by the prosecution and she has been declared hostile as she has not identified as to who made the call from her STD booth. She of-course gave slips Ex.P-7 and Ex.P-8 to the police and on Ex.P-8, telephone number where the call was made is 2521271, which according to Smt. Manju belongs to her. When Saroj Bala PW-11 has not identified as to who made the call in her cross examination, then it is difficult to believe that it was accused appellant Umesh who made this call by personating himself as Hanif. Even she has denied his identification and name given in the police statement Ex.P-57. Therefore, as per the FIR, accused appellant Umesh cannot be connected on the basis of this telephonic call. Even the police has not tried to collect the evidence with regard to the mobile phone recovered from the body of deceased vide Ex.P-73. The second name of person with whom she suspected to have

committed the offence is of Giriraj Soni, but he has been examined as prosecution witness as PW-9, and his evidence is of no use. On the contrary, he has said that there was partnership of his wife and deceased's wife and seven cases are pending against deceased's wife in pursuance to the cheque issued by his wife. He has also said that witnesses Piyush, Harish Bharti, Praveen Vasita, Amar Tanwar used to come his shop and threatened him to withdraw the cases otherwise it will not be good. He went to the police on call when compliant was filed by Smt. Manju about her husband's kidnapping and death. According to him, it is also true that Smt. Manju and her husband used to change their house due to demand of money by certain persons. Thus, motive to kill a person against whom money in lacs was due in the account of accused cannot be inferred.

9. Next evidence about last seen is of Mohd. Sajid PW-13, who said that he saw one Esteem Car near Kelva Chowpati on 25.6.2004 in the evening at about 6.30, in which, deceased Lalit Jain and accused Raju were sitting in the rear side and one person was driving the vehicle and after 4 to 5 days, he informed at the residence of deceased Lalit about all this. As per the recovery memo Ex.P-68, the esteem car No. RJ27 C 8285 was recovered on 1.7.2004. This witness Mohd. Sajid PW-13 has not given the number of the car. This witness is friend of Piyush

PW-22, who is brother-in-law of deceased and criminal case is pending with Piyush jointly. He has also admitted that 4 to 5 cases were instituted against him, in which, he was acquitted. He has narrated the story of last seen 4 to 5 days after the incident. Had it been so, the name of this witness could have been stated in the FIR, which was lodged by Smt. Manju before the Superintendent of Police, Udaipur. On the contrary, this witness has used to send the blocks at Arunodaya Marbles, a place near to the last seen, where he was working but nobody has been examined from this marble unit. Neither he has identified nor the identification parade was conducted by the police with this witness or from Saroj Bala PW-11 from where mobile call was made by Umesh Menaria, therefore, no reliance can be placed on the testimony on such a witness, who is a history sheeter and friend of Piyush PW-22, who is brother-in-law of deceased and also a history sheeter. Even Chaganlal, I.O. PW-37 has neither clarified in his cross examination as to how Mohd. Sajid PW-11 was a witness of last seen nor who were the other witnesses having seen deceased & accused appellants in the car. During cross examination, he said that he came to know about the name of Mohd. Sajid on 2nd July, when he talked with the wife of deceased in the morning. Thus, this evidence of last seen is not reliable.

10. Coming to the evidentiary value of extra judicial confession, which is said to have been made before Amit Tanwar PW-12, who has said in the examination in chief that on 27.6.2004, accused appellant Raju Panchal met him in anger and told that Lalit Jain has ruined him, therefore, he has put him to rest. He has also stated in his examination in chief that he told this fact on telephone at the residence of deceased Lalit on 2nd July but nothing has been said in this regard by Smt. Manju PW-21, wife of deceased in her statement. When a question was put to her in the cross examination, then she told that she got some hints on 2nd July that her husband has been murdered. Had this witness of extra judicial confession Amit Tanwar PW-12 knew about this fact, he could have told it on the very day to the wife of the deceased or the deceased's wife could have told that she received telephonic call from him. In the absence of any corroborative evidence, extra judicial confession before Amit Tanwar PW-12 also cannot be relied upon.

11. Apart from the unreliable evidence of last seen and extra judicial confession, the dead body has also not been identified properly so as to ascertain the cause of death as to whether it was homicidal or suicidal. To bring the case under the caption of homicidal death, the prosecution has relied upon the information furnished by both the accused appellants under Section 27 of the

Indian Evidence Act and the recovery made in pursuance to it from where the dead body was found or other places pointed out by the accused appellants. In this regard, police has said to have visited at the place of crime in the jeep of Praveen PW-7, but this witness Praveen PW-7 has been turned hostile and he denied that he ever went with the police in his jeep No. RJ 30 T 253. He of-course gave it on rental basis to the police for three days with driver Shanker but driver Shanker has not been examined. PW-8 Yogesh, who is the photographer of the dead body has also turned hostile and said that he signed blank papers at his shop. The person who saw the dead body is Jassu Bhai PW-5, but he too has been turned hostile. In the absence of the positive evidence coupled with the testimony of the Doctor Dharmesh S. Patel PW-33, who prepared the post mortem report Ex.P-77, it is clear that the body was totally decomposed and organs of the body were found to be unidentified. Further, this Doctor has opined in his cross examination that the injury found on the head of the dead body in the post mortem report Ex.P-77, whereby, fracture has been caused, cannot be inflicted with Pana (iron rod) and this Pana was not found to be sustained with human blood in the FSL Report Ex.P-62, which is the weapon said to have been used by the accused appellants as per the Investigating Agency. Of-course chaddi Ex.3, stone Ex.4, dari Ex.5 and piece of mat Ex.7 marked in FSL Report Ex.P-62 are of

human origin but the result of the blood group on these items was found to be inconclusive. Had the blood group on these items found with the same blood group of Pana (which was not sufficient for test), then some inference could have been drawn to link the accused appellants with the recovery of weapon. In the absence of conclusive evidence of recovery, no reliance can be placed on such recoveries made on the basis of information furnished by the accused appellants during custody.

12. In a criminal trial, when the case is not based on direct evidence, the circumstances must be of such a nature which must lead to no other conclusion except to the guilt of the accused and they should be in a proper chain. Here in the present case as discussed above, neither there is any direct evidence nor circumstantial evidence is of such a conclusive nature which may lead to the guilt of the accused. The circumstantial evidence can be looked into only when it is first established that the death is homicidal. When cause of death being homicidal is not proved then merely on the basis of unreliable circumstantial evidence, conviction cannot be recorded. The present trial is also of the same nature, for which, accused appellants are entitled to be benefited. The learned trial Judge has failed to appreciate the evidence in the light of the above finding.

13. Consequently, the appeal is allowed. The judgment dated 15.2.2006 passed by the learned Additional Sessions Judge (Fast Track), Rajsamand is set aside. Appellants – Umesh S/o Sukhlal and Raju @ Rajkumar S/o Thawar Chand Panchal are acquitted from the charges levelled against them for offence under Sections 364, 302 read with Section 34, 201 and 404 IPC. They are in jail. They shall be released forthwith, if not required in any other case.

(DEO NARAYAN THANVI),J. **(BHAGWATI PRASAD),J.**

ms rathore

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(Umesh & Anr. Vs. State of Rajasthan)

11.12.2007

HON'BLE MR. JUSTICE BHAGWATI PRASAD
HON'BLE MR. JUSTICE DEO NARAYAN THANVI

Mr. D.K.Gaur for the appellants.
Mr. J.P.S. Choudhary, Public Prosecutor.
Mr. Sandeep Mehta,
Mr. Vinod Sharma for the complainant.

Judgment was dictated and pronounced in open court today. The operative portion of the judgment reads as under:-

"Consequently, the appeal is allowed. The judgment dated 15.2.2006 passed by the learned Additional Sessions Judge (Fast Track), Rajsamand is set aside. Appellants – Umesh S/o Sukhlal and Raju @ Rajkumar S/o Thawar Chand Panchal are acquitted from the charges levelled against them for offence under Sections 364, 302 read with Section 34, 201 and 404 IPC. They are in jail. They shall be released forthwith, if not required in any other case.''

(See Separate Judgment)

(DEO NARAYAN THANVI),J. **(BHAGWATI PRASAD),J.**

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